

1 HONORABLE RONALD B. LEIGHTON
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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT TACOMA

10 CHALMERS C. JOHNSON, a single
11 individual,

12 Plaintiff,

13 v.

14 DAVID B. VAIL, et al,

15 Defendant.

16 CASE NO. C12-5847RBL

17 FINDINGS OF FACT AND
18 CONCLUSIONS OF LAW

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20 THIS MATTER came before the court for trial on March 17-19, 2014. The Plaintiff,
21 Chalmers C. Johnson, appeared pro se. The Defendants appeared with their attorney, Peter T.
22 Petrich of Davies Pearson, P.C. The court heard the testimony of Chalmers Johnson, Martha
23 Boden, David Vail, Jennifer Cross, Bridgette Lind, Teja Cronk, Tara Reck, and Shelly Speir.
24 The court has also reviewed all of the exhibits admitted into evidence and has considered the
arguments of counsel.

25 NOW, THEREFORE, based on the evidence before the court, the court enters the
26 following Findings of Fact:

FINDINGS OF FACT

1. The plaintiff, Chalmers C. Johnson, is an unmarried man and has resided in the Western District of Washington at all relevant times.

2. Defendant David B. Vail & Jennifer Cross-Eutener & Associates, PLLC is a law firm organized as a Washington Professional Limited Liability Company and that has conducted business in Pierce County, Washington at all relevant times.

3. Defendants David B. Vail and Paula Vail are married persons and have resided in Pierce County, Washington at all relevant times.

4. Defendants Jennifer Cross-Eutenier and Eric Eutenier are married persons and have resided in Pierce County, Washington at all relevant times herein.

5. At trial, the plaintiff presented three causes of action against the Defendants: (1) retaliatory termination in violation of the Fair Labor Standards Act of 1938, codified at 29 U.S.C. 201, *et seq.* (FLSA); (2) retaliatory termination in violation of Title VII of the Civil Rights Act of 1964, codified at 42 U.S.C. 2000e-3, *et seq.*; and (3) violation of a Washington wage statute, codified at RCW 49.48.010.

6. At the beginning of trial, plaintiff withdrew his claim for retaliatory termination in violation of the Fair Labor Standards Act of 1938.

7. As affirmative defenses, the Defendants have asserted that: (1) plaintiff's Amended Complaint fails to state a claim upon which relief may be granted; (2) plaintiff's claims are time-barred by applicable statutes of limitation; (3) plaintiff failed to perfect service of process of the original Complaint and, therefore, service of the Amended Complaint after the statute of limitations had expired was insufficient; (4) plaintiff is an exempt employee and is not entitled to any relief under the FLSA; and (5) plaintiff presented the Amended Complaint to

1 needlessly harass the Defendants and the allegations and claims contained therein are not
2 warranted and are not supported by admissible evidence.

3 8. The Defendants further requested an award of their reasonable costs and attorney
4 fees incurred in responding to plaintiff's Amended Complaint under 28 U.S.C. §1927.

5 9. Plaintiff Chalmers C. Johnson is an attorney licensed to practice law in the state
6 of Washington.

7 10. The law firm of David B. Vail & Jennifer Cross-Eutenier & Associates, PLLC
8 (hereafter "Vail-Cross") hired Mr. Johnson in July 2008 to work as a litigation attorney in its
9 workers compensation and personal injury practice groups.

10 11. Vail-Cross paid Mr. Johnson on a salary basis.

11 12. Vail-Cross acted reasonably in not paying Mr. Johnson—a professional—
12 "overtime" wages.

13 13. There is no evidence that Vail-Cross willfully withheld any wages from Mr.
14 Johnson to which Mr. Johnson was entitled.

15 14. By December 2008, Mr. Vail had become concerned about Mr. Johnson's work
16 performance, noting that the time required for Mr. Johnson to prepare cases called into doubt his
17 statements regarding his command of trial practice and the rules of evidence.

18 15. By December 2008, Mr. Vail also had concerns about Mr. Johnson's integrity,
19 noting that statements that Mr. Johnson made about his work did not comport with statements
20 that clients made about his work.

21 16. Mr. Vail also noted that Mr. Johnson's work product in workers compensation
22 cases was woefully deficient.

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1 17. Accordingly, in March 2009, Vail-Cross was constrained to stop assigning Mr.
2 Johnson workers compensation cases.

3 18. Also in March 2009, in conformance with Vail-Cross's progressive discipline
4 policy, Mr. Vail and Mr. Johnson had a detailed conversation regarding Vail-Cross's opinion that
5 Mr. Johnson's job performance was deficient, which Mr. Vail audio recorded.

6 19. Also in the spring of 2009, Vail-Cross began an investigation into Mr. Johnson's
7 workplace conduct, including by intermittently monitoring Mr. Johnson's firm computer and e-
8 mail account.

9 20. During Mr. Johnson's tenure at Vail-Cross, he informed his colleagues that the
10 wages that Vail-Cross paid were too low and that he intended to leave Vail-Cross and open his
11 own firm after learning the workers compensation from Mr. Vail.

12 21. Mr. Johnson also informed his colleagues that Vail-Cross's personnel manual
13 would not "hold up in court" and that he intended to sue Vail-Cross.

14 22. Mr. Johnson did not have any conversation with Mr. Vail in which he objected to
15 Vail-Cross's "overtime" procedures. Mr. Johnson did, however, complain of "overtime"
16 procedures to the Office Manager, Bridgette Lind.

17 23. In September 2009, Mr. Johnson did not work in excess of 40-hours per week at
18 Vail-Cross.

19 24. Mr. Johnson claims he worked 983.0 hours beyond a "typical" 40-hour work
20 week in his first year at Vail-Cross. This is an average of 58.9 hours per week for the year. Mr.
21 Johnson's testimony lacks credibility.

1 25. During Mr. Johnson's tenure at Vail-Cross, from time-to-time, Mr. Johnson may
2 have overheard his female coworkers engaging in general conversations—in which he did not
3 participate—regarding sex, hygiene, biology or anatomy.

4 26. Any general conversations between Vail-Cross employees regarding sex, hygiene,
5 or anatomy could have been overheard by men and women alike and were not based on Mr.
6 Johnson's sex.

7 27. Any general conversations between Vail-Cross employees regarding sex, hygiene,
8 biology or anatomy that Mr. Johnson may have overheard were not sufficiently severe or
9 pervasive to alter the conditions of Mr. Johnson's employment or to create an abusive working
10 environment.

11 28. Mr. Johnson's belief that overhearing such conversations created a hostile
12 working environment is not reasonable.

13 29. On September 25, 2009, as part of Vail-Cross's ongoing investigation regarding
14 Mr. Johnson's workplace conduct, office manager Bridgette Lind reviewed an e-mail exchange
15 between another attorney in the firm, Mr. Johnson, and Mr. Johnson's girlfriend regarding Mr.
16 Johnson's sexual relationship with the wife of a client.

17 30. Bridgette Lind promptly informed Mr. Vail about this September 25, 2009 e-mail.

18 31. Mr. Vail was alarmed by the September 25, 2009 e-mail and became immediately
19 concerned that Mr. Johnson's conduct lacked integrity and would jeopardize clients' trust in the
20 firm.

21 32. Vail-Cross determined that it had no choice but to terminate Mr. Johnson's
22 employment and to conduct a further investigation.

1 33. In order to preserve the integrity of its investigation, Vail-Cross determined that
2 Mr. Johnson's termination needed to be immediate.

3 34. On September 25, 2009, Vail-Cross terminated Mr. Johnson's employment.

4 35. In terminating Mr. Johnson, Mr. Vail informed Mr. Johnson that Vail-Cross was
5 terminating him for four reasons: (1) Vail-Cross was concerned about Mr. Johnson's honesty and
6 was conducting a further investigation, (2) Mr. Vail believed that Mr. Johnson's lack of candor
7 had prompted him to delete much of the recording of their March 2009 conversation regarding
8 Mr. Johnson's deficient job performance, (3) Vail-Cross believed that Mr. Johnson was not loyal
9 to the firm because he had informed colleagues that the wages paid by Vail-Cross were too low
10 and that he intended to open his own firm after learning the workers compensation practice area
11 from Mr. Vail, and (4) Mr. Johnson hurt morale at Vail-Cross by telling colleagues that Vail-
12 Cross's personnel manual would not "hold up in court" and that he intended to sue Vail-Cross on
13 an unspecified cause of action.

14 36. The four reasons that Vail-Cross gave for terminating Mr. Johnson's employment
15 are reasonable and non-discriminatory.

16 37. The evidence does not show that Vail-Cross's four stated reasons for terminating
17 Mr. Johnson's employment were pretextual.

18 38. After Vail-Cross terminated Mr. Johnson's employment on September 25, 2009,
19 its subsequent investigation produced evidence that Mr. Johnson had regularly viewed
20 pornographic images on his firm computer and received and sent sexually explicit e-mail
21 messages on his firm e-mail account, which would have caused Vail-Cross to terminate Mr.
22 Johnson's employment had it not already done so.

39. On September 20, 2012, Mr. Johnson commenced this litigation by filing a Complaint in the United States District Court for the Western District of Washington at Tacoma.

40. Mr. Johnson later received a Notice-of-Right-to-Sue from the Equal Employment Opportunity Commission (EEOC) dated October 3, 2102.

41. On December 10, 2012, Mr. Johnson filed an Amended Complaint in this litigation, which was served on the Defendants in January 2013.

42. The testimony of David B. Vail, Jennifer Cross-Eutenier, and Bridgette Lind is credible.

43. After hearing all testimony presented, the court finds that the testimony presented by the defendants is more credible than the testimony presented by the plaintiff.

NOW, THEREFORE, based on the foregoing Findings of Fact, the Court enters the following Conclusions of Law:

CONCLUSIONS OF LAW

1. The court has jurisdiction over the parties and subject matter of this action in accordance with 29 U.S.C. §215(a)(3), *et seq.*; 42 U.S.C. §20003-4; and 28 U.S.C. §1367.

2. Plaintiff bears the ultimate burden of proof on each of his claims and that burden is by a preponderance of the evidence.

3. As a licensed attorney who Vail-Cross employed to practice as a litigation attorney in its workers compensation and personal injury practice areas, Mr. Johnson is covered by the FLSA's professional exemption in 29 U.S.C. §213(a)(1) and 29 C.F.R. §541.300(a)(1)-(2)(i). Accordingly, Mr. Johnson was an exempt employee who has no basis for relief under the FLSA.

1 4. Additionally, Vail-Cross's four stated reasons for terminating Mr. Johnson are
2 reasonable and non-discriminatory.

3 5. Mr. Johnson has did not prove that Vail-Cross's four stated reasons for
4 terminating his employment were pretextual.

5 6. An employee's right to overtime wages under Washington law is governed by
6 chapter 49.46 RCW.

7 7. Under Washington law, the general requirement for employers to pay overtime
8 wages to employees who work more than 40-hours per week does not apply to any person
9 exempted under RCW 49.48.010(3) or RCW 49.46.130(2)(a)-(b).

10 8. Professionals are exempted from Washington's overtime statute. RCW
11 49.46.010(3)(c).

12 9. For purposes of chapter 49.46 RCW, "professionals" include persons whose work
13 requires the consistent exercise of discretion and judgment in its performance and whose work is
14 predominantly intellectual and varied in character. WAC 296-128-530(2)-(3).

15 10. Mr. Johnson is a professional and his employment at Vail-Cross is exempted from
16 chapter 49.46 RCW.

17 11. Accordingly, Mr. Johnson is not entitled to "overtime" wages under RCW
18 49.48.010.

19 12. In summary, the court finds in favor of the Defendants on each of Plaintiff's
20 claims.

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1 13. Defendants' claims under 28 U.S.C. § 1927 and 42 U.S.C. § 2000e.5(k) for
2 attorney's fees are **DENIED**.

Dated this 24th day of March, 2014.

Ronald B. Lightner

RONALD B. LEIGHTON
UNITED STATES DISTRICT JUDGE